

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



**FILED**

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Order Instituting Rulemaking on the	)	
Commission's Own Motion to Assess and	)	
Revise the Regulation of	)	R. 05-04-005
Telecommunications Utilities.	)	
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Rulemaking for the Purposes of Revising	)	
General Order 96-A Regarding Informal	)	R.98-07-038
Filings at the Commission.	)	
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**APPLICATION FOR REHEARING OF D.07-09-018  
BY THE UTILITY REFORM NETWORK**

Dated: October 12, 2007

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## I. INTRODUCTION

Pursuant to Public Utilities Code Section 1731 and the Commission's Rules of Practice and Procedure, Rule 16.1, the Utility Reform Network files this Application for Rehearing of D.07-09-018 (Final Decision or Decision). The Commission has failed to proceed in a manner required by law when it unduly narrows the protest rights of interested parties pertaining to rate-related tariff filings.<sup>1</sup>

In the Final Decision the Commission makes it clear, for the first time, the monumental impacts the Commission's findings in the URF Phase I decision will have on consumers. In URF Phase I, the Commission found that sufficient competition exists throughout the state so that the four largest incumbent LECs do not have sufficient market power to sustain prices above a competitive level.<sup>2</sup> In the Final Decision at issue here, the Commission uses this URF finding to divest itself of any responsibility or willingness to substantively review rate tariff filings, despite the fact that many of the services granted pricing flexibility will remain tariffed for the foreseeable future.

The Commission declares that it will not even entertain a protest of an advice letter filing if that protest is based on the grounds that the rate is unjust, unreasonable or discriminatory.<sup>3</sup> Instead, the Commission states that such rates will always be found to be just and reasonable because "in a competitive marketplace, the rates of the market participants are disciplined by each other's offerings."<sup>4</sup> But this self-serving statement

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<sup>1</sup> Public Utilities Code §1757.1 states the grounds for review of a quasi-legislative decision from this Commission. Subsection 2 states as a ground, "the commission has not proceeded in the manner required by law."

<sup>2</sup> D.06-08-030, FOF 50.

<sup>3</sup> Final Decision at p. 81, COL 5, "Permitting protests to the rates in [URF carrier] advice letters would effectively challenge and refute the findings and pricing flexibility granted in the URF Phase I decision."

<sup>4</sup> Final Decision at p 28.

begs the question: while the carriers are “disciplining” each other, who will discipline the carriers and what remedies will consumers have in this new world?

As discussed below, there is no legal basis for the Commission’s statement in Conclusion of Law 5 that intervenors can no longer protest an advice letter filing pursuant to Public Utilities Code Section 451 and 453.<sup>5</sup> Such a conclusion is not supported by statute or the Commission’s rules and is contradicted by other findings in the Final Decision. As such, this Final Decision is reviewable under Section 1757.1 as the Commission has failed to proceed in a manner required by law.

## **II. THERE IS NO LEGAL BASIS TO JUSTIFY THE COMMISSION’S REFUSAL TO REVIEW TARIFFS FOR REASONABLENESS**

Reasonableness Although the Commission is a creature of the California Constitution, it receives its ratemaking authority from a delegation of powers by the Legislature.<sup>6</sup> Through the Public Utilities Code, the Legislature has set forth the process and procedures that the utilities and the Commission must follow. For example, Section 451 requires that rates charged by utilities, including telephone corporations, must be just and reasonable. Section 453 prohibits discrimination among customer classes or geographic serving areas in the rates charged for services. Sections 454 and 455 provide utilities and intervenors with due process rights when the Commission, acting upon delegated authority from the Legislature, reviews utility rate filings.

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<sup>5</sup> Unless otherwise specified, all statutory cites are to the Public Utilities Code.

<sup>6</sup> Under organic and statutory law, privately owned utility companies are subject to regulation by the Public Utilities Commission, a regulatory agency vested by the Legislature with the exclusive power to set utility rates which are “just and reasonable” (Cal. Const., art. XII, § 3; Pub. Util. Code, § 201 et seq., § 451). *American Microsystems, Inc. v. City of Santa Clara* (1982, 1st Dist) 132 Cal App 3d 986, 183 Cal Rptr 588, 1982 Cal App LEXIS 1683.

The Commission has implemented these statutes through its Rules of Practice and Procedure, General Orders and through thousands of different decisions. One very important regulatory tool designed to implement several statutory mandates and ensure procedural due process is the advice letter process. The advice letter process is codified in General Order 96-B.<sup>7</sup> Recently, the Commission has made several changes to this decades-old process, but the Commission continues to acknowledge its important role in providing a notice and opportunity to be heard on many rate-related matters before the Commission for all industries.<sup>8</sup>

#### **A. The Final Decision Weakens the Advice Letter Process By Unduly Narrowing the Right to Protest**

Through the advice letter process, wherein carriers file tariffs, contracts, and tariff changes for Commission review, the Commission holds itself out to the public as conducting a meaningful review of the rates, terms and conditions of utility service in the public interest. In order for the advice letter process to truly be meaningful, however, the Commission must make a serious and detailed review of the terms and rates of a service.<sup>9</sup> In addition, parties' due process rights must be protected by ensuring their full participation. G.O. 96-B sets forth the requirements that must be adhered to when a utility files an advice letter. These procedures, if properly followed, ensure parties' due

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<sup>7</sup> In D.07-01-024 the Commission made substantial revisions to G.O. 96-A and creating a new revision, G.O. 96-B. One of the major changes was to develop a tier review system for advice letters.

<sup>8</sup> D.07-01-024 at p.5-6, "GO 96-B is an important tool for managing our decision-making resources. By carefully defining, clarifying and streamlining the advice letter process, we ensure optimal use of that process, which is much shorter and much less labor intensive than formal applications. In fact, optimal use of advice letters helps to ensure that matters for which formal proceedings are necessary . . . receive proper attention." *But see*, D.06-08-030 at 182, which predates the G.O. 96-B decision, wherein the Commission calls the advice letter process outdated and burdensome.

<sup>9</sup> *See*, Final Decision at p. 28, wherein the Commission agrees that a meaningful review is necessary "For example, TURN defends its modified Tier 2 by saying, 'to the extent a carrier's service is tariffed, there must be some meaningful review of changes to those tariffs.' [omit citation] The statement is undeniably true, but what is 'meaningful' logically relates to the kind of regulatory scrutiny required."

process rights as well make the advice letter process a meaningful way to ensure just and reasonable rates.

As part of this docket, the Commission revised GO 96-B in light of recent changes to the Commission's regulation of the telecommunications industry.<sup>10</sup> In comments, TURN and DRA proposed changes designed to ensure the advice letter and tariffing process remain a meaningful and effective regulatory tool. For example, TURN and DRA proposed that the Commission require staff to suspend an advice letter in response to certain types of protests. To the extent a service offering by a carrier is still tariffed and that carrier is filing advice letters for that service, there must be a meaningful opportunity to protest a carrier's filing. The existence of an advice letter process suggests to the public that the Commission is taking in hand the process of reviewing these tariffs for reasonableness and nondiscrimination among other factors.

The Final Decision not only rejects TURN's proposal, but in doing so substantially narrows the grounds on which any interested party can protest a carrier's rate filing. It also puts into stark reality the broader impact of the Commission's earlier determination in the URF Phase I decision that the large four incumbent local exchange carriers lack market power and are challenged by competition.

The Commission states that it does not have to perform a just and reasonableness analysis on tariffed rates because, "in a competitive marketplace, the rates of the market participants are disciplined by each other's offerings."<sup>11</sup> Based on its findings in URF Phase I, the Commission appears to have taken the authority delegated to it by the Legislature to set rates and to ensure those rates are just and reasonable and delegated

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<sup>10</sup> Assigned Commissioner's Ruling and Scoping Memo, R.05-04-005, December 11, 2006 and D.07-01-024 at p.4.

<sup>11</sup> Final Decision at p. 28.

that authority to the carriers themselves. The Commission makes it clear that interested parties have no right to protest an advice letter changing rates based on the grounds that a rate may be unjust, unreasonable or discriminatory.<sup>12</sup> This decision turns the notion of an administrative agency tasked with protecting the public interest on its head. Despite allowing the carriers to continue to file tariffs, the Commission has handed over the review process and walked away assuming that the marketplace will take care of consumers. And, to make matters worse, they have stifled the voices of anyone who challenges this reliance on the market by taking away their full protest rights.

In the Final Decision, the Commission has held that since it may lack the authority to order full detariffing, it will permit permissive detariffing with certain exceptions such as for basic service. By allowing carriers to retain tariffs, and all the important carrier protections that are associated with tariffs (e.g., the filed rate doctrine and limitation of liability), the Commission has tilted the playing field in favor of the URF carriers and against consumers.<sup>13</sup> Tariffs are intended to provide protections not only to the carriers, but to consumers as well. One of the most important elements of a tariff is the price, and historically, by requiring carriers to file advice letters seeking a price increase, consumers were permitted the opportunity to challenge such increase as being unjust and unreasonable. Yet, in the Final Decision, the Commission has eliminated the consumer's rights to protest price increases, while allowing the carriers to retain all the benefits of their tariffs. The injustice of this is apparent on its face. To add

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<sup>12</sup> Final Decision at p. 81-82. For purpose of this Application for Rehearing TURN is assuming that the limitation on protests applies to all services granted pricing flexibility, including basic service. Although basic service is currently under a rate freeze the Commission's intent is to implement pricing flexibility in light of URF Phase I findings. The Commission's rationale for limiting protests would apply equally, therefore to basic service tariff filings. TURN's arguments in this Application for Rehearing apply equally to basic service rate filings as well.

<sup>13</sup> Final Decision at p.82, "To the extent that a carrier files a tariff, the courts recognize the filed rate doctrine and limitation of liability contained in that tariff."

insult to injury, the carriers are permitted to pick and choose which services (and possibly which geographic areas of the state) they want tariffed and which to detariff. Thus, the URF carriers get the best of all worlds – retain tariffs for services they would like protections; detariff services where such protections are irrelevant – and in either case, consumers cannot protest price increases.

The Commission dealt with non-dominant interexchange carriers (NDIECs) in a different way. In 1994, the Commission found that non-dominant interexchange carriers were competitive carriers.<sup>14</sup> In order to grant regulatory relief for those carriers, the Commission did not grant pricing flexibility, but instead moved to completely detariff their services pursuant to Section 495.7. As discussed above, tariffs provide benefits to the carrier that often times outweigh the burden of maintaining them. As a result, many of the NDIECs did not want to detariff in response to the Commission's decision in that docket. TURN notes that to the extent an NDIEC continued to be subject to tariffing rules, the Commission did not make exceptions, grant them pricing flexibility, limit the relevant grounds for protest, or somehow lessen the carriers' tariff obligations.<sup>15</sup> The Commission laid a clear line: either these companies were tariffed and thus subject to G.O. 96-A or they were not having satisfied Section 495.7. To this day, an NDIEC still has rate-related obligations before this Commission.<sup>16</sup>

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<sup>14</sup> *Re: California Association of Long Distance Telephone Companies*, 54 CPUC 2d 520, 522 (1994)(D.94-05-051).

<sup>15</sup> For certain NDIEC's the Commission did simplify the process to obtain a certificate of public convenience and necessity pursuant to Section 1013.

<sup>16</sup> At almost every Commission meeting there are one or two Commission decisions granting requests to offer telecommunications service in the state. These applicants offer interexchange service and the Commission makes it clear that these companies have obligations. For a recent example see, *Application of TalkFreeToo, Inc. for a CPCN*, A.07-02-034, D.07-09-034; *See also*, *Application of Bandwidth.com CLEC LLC for a CPCN*, A.07-03-020, D.07-09-035.

Furthermore, the Final Decision's prohibition on protests based on just and reasonableness is so sweeping that even for services that the Commission held could not be detariffed or flexibly priced (e.g., basic service; carrier of last resort tariffs, etc.), consumers' fundamental rights have been eliminated through the broad and erroneous interpretation of Commission rules in the Final Decision.

### **B. G.O. 96-B Does Not Support The Elimination of Certain Grounds for Protest**

The Commission looks to G.O. 96-B, as revised by D.07-01-024, for support for the notion that parties cannot protest an advice letter based on §§ 451, 453.<sup>17</sup> The Commission misinterprets G.O. 96-B.

G.O. 96-B, Section 7.4.1, mandates that parties have a right to protest advice letters and sets forth the grounds on which those protests can be based. Section 7.4.2 imposes very narrow limitations to protests, including limits on the right to make a protest based on the just and reasonableness of a proposed rate. The General Order states that the Commission will not permit a protest based on the grounds that a rate is unjust, unreasonable or discriminatory, if:

- such a protest would require relitigating a prior order of the Commission;
- the Commission does not regulate the rates of a specific type of utility; or
- the Commission has established a rate band within which the utility is free to set rates and the proposed rate is within that rate band<sup>18</sup>

As TURN pointed out in its comments on the PD, none of the scenarios contemplated in G.O. 96-B are present here.<sup>19</sup> For example, G.O. 96-B says a protest based on grounds that a rate is unreasonable is not appropriate if it would cause the

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<sup>17</sup> Final Decision at p.27-28, 80-82

<sup>18</sup> General Order 96-B, Section 7.4.2. (6), Example 2

<sup>19</sup> TURN Opening Comments on the Proposed Decision of Commissioner Chong at pp. 14-15.



Commission to relitigate a prior order of the Commission. The URF Phase I Decision found that there was competition and that carriers should have pricing flexibility. TURN does not challenge that finding here, contrary to the Commission's accusation. However, the Commission cannot claim that there has been litigation of a specific carrier's rate for a specific service. Any protest of a specific rate based on just and reasonableness cannot be seen as *relitigation*. Certainly, the Commission's intent in including this exemption was designed to prevent a party from attempting to relitigate a rate for a second time after the Commission spent significant time and resources litigating the rates for a specific service the first time. But that is not the case here and if it is up to the Commission time and effort will never be spent litigating a rate for a service again. The decision in URF Phase I did no more than make general policy pronouncements. There was no specific analysis of any rate to ensure that the rate would be just and reasonable; therefore those findings cannot be used to bar protests pursuant to G.O. 96-B.

It is also improper to suggest that the Commission does not regulate rates. The Commission has given carriers pricing flexibility for certain services that they offer in California. This grant of pricing flexibility in URF came with many limitations and restrictions and only pursuant to very specific terms and conditions.<sup>20</sup> The Commission has made it clear that it will investigate and possibly revoke the pricing flexibility at signs of problems. Therefore, it is not that the Commission is foreclosed or prevented from regulating the rates for these types of utilities. It is merely the case that the Commission has granted these carriers the ability to flexibly price services at this point in time. These

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<sup>20</sup> See, D.06-08-030 at p. 155 (setting price floors on basic residential rates); p.156 ("We will remain vigilant in monitoring the voice communications marketplace. We will ensure that basic residential service remains affordable.. ."); p. 202, requiring customer notices of rate increases or withdrawal of service; p. 143 (placing price controls on rates subsidized by CHCF-B).

utilities are still required to file certificates to serve in the state (no finding in URF was made as to PU Code §1013), required to comply with any relevant consumer protection or service quality standard, and, most importantly, they are still filing tariffs. G.O. 96-B Section 7.4.2. Example 2, does not support the Commission's claim that it no longer has to entertain protests based on the grounds that a rate is unjust, unreasonable or discriminatory.

The Commission's URF findings are not sufficient to support the Commission's attempt to shirk its responsibilities pursuant to the Public Utilities Code or to unduly limit a parties' right to protest an advice letter.

### **C. The Commission Offers the Right to File A Complaint Demonstrating Continued Regulatory Authority**

The Commission has given other indications that it continues to regulate the rates of these carriers. The Commission acknowledges that interested parties may file a complaint, as opposed to a protest, on the grounds that a rate violates the just and reasonableness standard.<sup>21</sup> To say that an interested party must bring a complaint to exercise their right to protest a rate is a problem for two reasons. First, it demonstrates that the Commission continues to "regulate" rates for the carriers, albeit the Commission has chosen to forebear from that duty at this time. It also consists of a meaningless promise since complaints are much less effective regulatory tool in this context than an advice letter protest.

Presumably, the Commission would not hold out the option of filing a complaint as an empty promise but instead assumes it would have the regulatory authority to review and litigate such a complaint involving rates. The Commission also claims to have the

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<sup>21</sup> Final Decision at p. 82.

authority, on its own motion, to take “appropriate action” if the market fails to develop as it expects.<sup>22</sup> These attempts to mollify the intervenors demonstrate that the Commission believes it still has regulatory authority over these carriers and the rates for these services.

In the Final Decision, the Commission makes no attempt to explain why a consumer can bring a complaint to the Commission, but cannot protest an advice letter on the same grounds. From an intervenor’s perspective, there is a qualitative difference between the right to file a complaint and the right to file a protest on an advice letter. A complaint is a much more resource-intensive and difficult undertaking, one that would intimidate many intervenors from participating. A complaint takes longer to resolve and places the burden of proof squarely on the intervenor to demonstrate the unreasonableness of a rate. While an intervenor can certainly gather together preliminary and high level evidence of problems with a rate to justify filing a protest, it would more than likely be difficult to withstand a Motion to Dismiss in a complaint proceeding without access to information only the carrier would have.

#### **D. The Commission Has No Legal Authority to Declare all Rates As Just and Reasonable**

As discussed above, the Commission has delegated authority from the Legislature to set rates for utility services. The Legislature has declared that all rates must be just and reasonable and non-discriminatory. The Legislature has also set out specific procedures the Commission must follow to review rates.

The Commission has used its finding in URF, that the carriers lack market power, to create a very narrow role for it to play in carrying out the Public Utilities Act, in particular Sections 451 and 453. Instead, it leaves the bulk of the duties to the

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<sup>22</sup> *Id.*

marketplace and the pressure of competition. To justify minimizing its role, the Commission finds that because the carriers lack market power there is no way in which those carriers' rates could be unjust and unreasonable, ever.<sup>23</sup> Neither URF Phase 1 nor this Final Decision support such a leap of faith.

The Legislature certainly does not contemplate such a leap. The Commission is delegated significant responsibility by the Legislature to protect consumers and ensure reasonable rates.

In the exercise of its plenary power the legislature has provided that all charges by a public utility for commodities or services rendered shall be just and reasonable, Cal. Pub. Util. Code § 451, *and has given the Public Utilities Commission the power and obligation to determine not only that any rate or increase in a rate is just and reasonable, Cal. Pub. Util. Code §§ 454, 728, but also authority to supervise and regulate every public utility in the state and to do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. Cal. Pub. Util. Code § 701.*<sup>24</sup>

The Legislature and the courts have bestowed the right to set rates upon the Commission with the understanding that the concomitant obligation to protect consumers will be carried out. With this broad authority, the Commission has the right to adjust and revise its procedural processes. However, the Commission cannot pick and choose which Legislative directives it wants to enforce at its whim. There are basic requirements, such as those in Sections 451 and 453 that must always be enforced, to the fullest extent

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<sup>23</sup> Final Decision at 81, "Because we found that the URF Carriers lack market power, we also concluded that URF Carriers will not be able to raise prices for telecommunications services unreasonably due to market forces."

<sup>24</sup> *CampMeeker Water Sys. V. Public Utils. Comm* 51 Cal 3d 845, 861. (emphasis added); *See also, San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal. 4th 893,

The Public Utilities Act vests the commission with broad authority to supervise and regulate every public utility in the State and grants the commission numerous specific powers for the purpose. The commission's powers are not limited to those expressly conferred on it: the Legislature further authorized the commission to do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient in the exercise of its jurisdiction over public utilities. Accordingly, the commission's authority has been liberally construed and includes not only administrative but also legislative and judicial powers.

possible. It is a widely accepted principle of statutory construction that a statute must be interpreted to be consistent with Legislative intent.<sup>25</sup> The decision to let competition do the work of the Commission in ensuring reasonable rates and to deny interested parties the ability to protest a rate filing based on a claim that a rate is unreasonable emasculates the legislative intent to delegate rate-making obligations to the Commission.

As discussed above, the Commission suggests it is fulfilling its obligations under Section 451 by relying on competition to maintain reasonable rates. *Neither Section 451 nor 453 have any exceptions for rates in a competitive marketplace.* In contrast, some statutes, such as Sections 851 and 854 have provisions that allow the Commission to waive those requirements for certain types of utilities.<sup>26</sup> Other statutes such as Section 495.7 require the Commission to make certain findings in order to exempt carries from tariffing requirements. Interestingly, even a finding that the elements of Section 495.7 have been satisfied, which the Commission makes in this Final Decision, does not exempt utilities from Sections 451 and 453. It also does not exempt the Commission from its duty to implement its ratemaking authority in the public interest to ensure rates comply with all Legislative directions and requirements, including Sections 451 and 453. The Commission has not proceeded in a manner required by law when it declares that competition and the rates of other market participants will ensure that all rates subject to pricing flexibility, present and future, are a prior just and reasonable.

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<sup>25</sup> *Pacific Tel. & Tel. Co. v. Public Util. Commission*, 62 Cal 2d 634, citing *River Lines, Inc. v. Public Utilities Com.*, ante, pp. 244, 247 [42 Cal.Rptr. 104, 398 P.2d 144].) "[Statutes] are to be interpreted to give a reasonable result consistent with the legislative purpose."

<sup>26</sup> Public Utilities Code §853(b), "The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds the application thereof with respect to the public utility or class of public utility is not necessary in the public interest."

### III. CONCLUSION

For the reasons stated above, D.07-09-018 contains legal error and must be reviewed by the Commission pursuant to Section 1757.1 as the Commission has not proceeded in a manner required by law. The Commission must delete language from the Final Decision that violates the Commission's statutory obligations when it limits the Commission's responsibility to ensure rates are just and reasonable and delete language that limits an interested parties' right to protest a utility rate filing on the basis that a rate is unreasonable or discriminatory.

Dated: October 12, 2007

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I, Lela Yeomans, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On October 12, 2007 I served the attached:

**APPLICATION FOR REHEARING OF D.07-09-018  
BY THE UTILITY REFORM NETWORK**

on the parties attached service list for R.05-05-005 and R.98-07-038 by sending said document via email to each of the parties.

Executed this October 12, 2007, at San Francisco, California.

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/S/

Lela Yeomans

# CALIFORNIA PUBLIC UTILITIES COMMISSION

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# CALIFORNIA PUBLIC UTILITIES COMMISSION

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